TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

*"ERC" refers to the *Environment Reporter-Cases*, published by the Bureau of National Affairs.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ABERDEEN AND ROCKFISH RAILROAD CO., *et al.*,

Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), and ENVIRONMENTAL DEFENSE FUND, NATIONAL PARKS AND CONSERVATION ASSOCIATION, and IZAAK WALTON LEAGUE OF AMERICA (EDF, *et al.*)

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

For the reasons set forth below, appellees Environmental Defense Fund, National Parks and Conservation Association, and Izaak Walton League of America ("EDF, *et al.*") move, pursuant to Rule 16 of the Rules of the Supreme Court, to dismiss these appeals for lack of jurisdiction, or in the alternative, to affirm the

decision and order of the court below, entered on February 10, 1974, from which these appeals are taken.

I.

THIS COURT LACKS JURISDICTION TO ENTERTAIN THE PRESENT APPEALS.

Both appellants United States of America and Interstate Commerce Commission (the "Government") and appellants Aberdeen and Rockfish R. Co., *et al.*, (the "Railroads") assert as the sole basis for this Court's jurisdiction 28 U.S.C. §1253.[1]

Section 1253 provides that:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court *from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction* in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." (Emphasis added.)

This case, however, does not involve an "appeal to the Supreme Court from an order granting or denying . . . an . . . injunction." See *Public Service Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939).[2] While the court below did deny an injunction

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[1] Government's Jurisdictional Statement ("Gov.J.S."), p.2; Railroads' Jurisdictional Statement ("R.R.J.S."), p. 2. Although the Government also cites 28 U.S.C. §2101(b), it is clear that this section relates solely to the timing of the appeal, and creates no independent basis for jurisdiction.

[2] *See also Mitchell v. Donovan*, 398 U.S. 427, 429-31 (1970); *Rockefeller v. Catholic Medical Ctr.*, 397 U.S. 820 (1970); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 152-55 (1963); *Perez v. Ledesma*, 401 U.S. 82, 86-87 (plurality opinion per Black, J.), 89 (Stewart and Blackmun, J.J., concurring), 96

which had been sought by appellees, 371 F.Supp. at 1307-10, *no party now appeals from that denial.* The order appealed from by appellants provides merely that:

> "It is ORDERED that the Interstate Commerce Commission's orders of October 4, 1972 and May 2, 1973 in Ex Parte 281 are vacated and this case is remanded to the Commission for further proceedings consistent with the opinion in this case." Gov.J.S., p. 2b.

This order is plainly not an injunction. As this Court stated in *Gunn v. University Committee to End the War,* 399 U.S. 383, 389 (1970), "an injunctive order is an extraordinary writ, enforceable by the power of contempt."

Nothing in the opinion below suggests that this order "was intended to carry contempt sanctions," *Taylor v. Board of Education, Etc.,* 288 F.2d 600, 604 (2d Cir. 1961), *cert. den.,* 368 U.S. 940 (1961). The lower court did not characterize its order as an injunction, and appellants refrain from so characterizing it in their jurisdictional statements.[3] Nor does this order follow the requirements for an injunction as to form.[4]

The lower court, *which specifically refused to enjoin collection of any of the increased freight rates in issue* (371 F.Supp. at 1307-10) explained (*id.* at 1308, n. 50) that:

(Brennan, White, and Marshall, J.J., concurring in part and dissenting in part) (1971); *Gunn v. University Committee to End the War,* 399 U.S. 383, 386-88 (majority opinion per Stewart, J.), 391 (White and Brennan, J.J., concurring) (1970).

[3] See Gov.J.S., p. 10; R.R.J.S., p. 17.

[4] See *Gunn, supra,* 399 U.S. at 388 ("Rule 65(d) of the Federal Rules of Civil Procedure provides that any order granting an injunction 'shall be specific in terms' and 'shall describe in reasonable detail * * * the act or acts sought to be restrained.' ")

"The only consequence of our vacating the Commission's orders pending reconsideration of the rate increases 'is that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable. In an action for reparations, for example, the railroads could not gain any benefit from the purported Commission approval of the increases.' Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade, . . . 412 U.S. at 818 . . . ."

The Government adopts this assessment (Gov.J.S., p. 10, n. 8), and concedes (*id.* at 13) that the effect of the Commission's general revenue orders, such as those vacated below, is "simply to shift the burden of proof" in possible subsequent proceedings.

Thus, in vacating these orders, the lower court granted no more, in effect, than a declaratory judgment as to where the burden of proof would lie if "some subsequent proceeding" were commenced.

Nor, obviously, did the lower court grant an injunction merely by "remand[ing the case] to the Commission for further proceedings consistent with the [court's] opinion," *i.e.*, for another attempt to prepare an adequate environmental impact statement, pursuant to § 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), for the holding of a hearing, and for reconsideration of the vacated orders. No one has suggested that the Commission risks contempt if its revised impact statement, like the previous one, is found to be deficient in scope and analysis. As the Court of Appeals for the Second Circuit (Friendly, J.) observed in *Taylor v. Board of Education, Etc., supra,* 288 F.2d at 604:

"[J]ust as not every order containing words of restraint is a negative injunction . . . so not every

order containing words of command is a mandatory injunction . . . ."

This Court has held on numerous occasions that its jurisdiction to hear direct appeals from three-judge courts is to be construed narrowly and technically, because "any loose construction . . . would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket." *Phillips v. United States*, 312 U.S. 246, 250 (1941). See also *Goldstein v. Cox*, 396 U.S. 471, 478 (1970); *Stainback v. Mo Hock Ke Lock Po*, 336 U.S. 368, 375 (1949); *Moore v. Fidelity & Deposit Co.*, 272 U.S. 317, 321 (1926).

This canon of narrow and technical interpretation is specifically applicable in determining whether an "injunction" is at issue for purposes of 28 U.S.C. § 1253. *Mitchell v. Donovan*, 398 U.S. 427, 429-31 (1970); *Rockefeller v. Catholic Medical Ctr.*, 397 U.S. 820 (1970); *Gunn, supra; cf. Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 152-55 (1963).

Since the order below is not an injunction under any conventional test, *a fortiori* it is not an injunction under the stringent test applicable in construing § 1253. Indeed, if this order were an injunction for § 1253 purposes, it would be hard to imagine an order that was not.

In sum, the only injunction at issue below was the one sought by appellees—not appellants—and refused by the district court. 371 F.Supp. at 1307-10. Appellants, having prevailed as to that injunction, lack standing to appeal from their victory. *Brashear, supra*, 306 U.S. at 206-07; *Gunn, supra*, 399 U.S. at 390, n. 5. "And as no appeal has been taken to review the decree denying the injunction, this Court is without jurisdiction," *Brashear, supra*, 306 U.S. at 207.

The law on this jurisdictional issue is plain, unambiguous, and long-settled. It requires that the present appeals be dismissed. *Brashear, supra,* 306 U.S. at 207; *Hutcherson v. Lehtin,* 399 U.S. 522 (1970).

II.

IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

Apart from the fatal jurisdictional flaw just noted, it is plain that the questions presented by these appeals are unsubstantial and were decided correctly below. The arguments on which these appeals are based are as follows:

1. *That the Commission's compliance with the National Environmental Policy Act in its general revenue proceedings is immune from judicial review.*

This argument is advanced principally by the Railroads (R.R.J.S., pp. 18-22; cf. Gov.J.S., p. 13, n. 9). The Railroads do not contend that judicial review of the Commission's general revenue proceedings is precluded by statute. Nor do they claim that the statute which was found below to have been violated, § 102 of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, is so broadly drawn as to provide no "law to apply." *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 410 (1971).

Rather the Railroads rely on a line of cases[5] in which review of a general revenue order was held

[5] See cases cited at R.R.J.S., p. 20, n. 6.

premature–under judicial, not statutory, doctrines of ripeness and exhaustion of administrative remedies–because the parties seeking such review were shippers who attacked specific, individual rate increases permitted by the Commission. The Railroads concede that denial of relief to the shippers in these cases was "based upon . . . the availability of further remedies,"[6] namely administrative reparation proceedings under 49 U.S.C. §§13(1), 15(1) and 16(1) which "focus[] upon individual rates."[7]

None of the cases relied upon by the Railroads involved a challenge to the Commission's procedural compliance with NEPA in preparing and circulating an impact statement on the *cumulative* environmental effects of a general rate increase covering "literally thousands of individual rates" (R.R.J.S., p. 31).[8] The court below, after careful and thorough consideration (371 F.Supp., pp. 1296-98), correctly held that even if the continued validity of these cases is assumed–a point which is in some doubt[9]–these cases are nonetheless

[6] R.R.J.S., p. 20.

[7] *Id.*

[8] As to the duty of federal agencies to assess the *cumulative* environmental effects of their proposed actions through the NEPA procedure, *see* Council on Environmental Quality, *Guidelines: Preparation of Environmental Impact Statements* (hereinafter "*CEO Guidelines*"), §§1500.6(a), (d)(1), 38 Fed. Reg. 20550 (Aug. 1, 1973); *Scientists' Institute for Public Information v. Atomic Energy Comm'n*, 481 F.2d 1079 (D.C.Cir. 1973); compare *Greene County Planning Board v. Federal Power Comm'n*, 455 F.2d 412, 421 (2d Cir. 1972), *cert. den.*, 409 U.S. 849 (1972) ("[W]e would not lightly suggest that the Council . . . has misconstrued NEPA.").

[9] *See Atlantic City Elec. Co. v. United States*, 306 F.Supp. 338 (S.D.N.Y. 1969), and *Alabama Power Co. v. United States*, 316 F.Supp. 337 (D.D.C. 1969), *both aff'd by an equally divided Court*, 400 U.S. 73 (1970).

wholly inapposite, because 49 U.S.C. § 13(1) does not provide further, unexhausted administrative remedies where, as here, the relief sought is not an alteration of one or more individual rates, but rather the specific enforcement of the Commission's procedural NEPA duties at the stage of the general revenue proceeding. A challenge to the adequacy of the Commission's analysis of cumulative environmental effects at that stage raises "far different questions," 371 F.Supp. at 1298, from those that can be raised in § 13(1) proceedings, which are available only in individual instances in which a carrier (*not* the Commission) is claimed to have violated the Interstate Commerce Act (*not* NEPA).

The court below noted that:

> "It is suggested that an environmental group, while it could not obtain reparations [in a § 13(1) proceeding], should be able to complain that a particular charge on a particular item is unreasonable because of its environmental effects. Thus if SCRAP [or EDF, *et al.*] could initiate an investigation on this theory, it could argue further that before rejecting the complaint the Commission would have to prepare an environmental impact statement [on the individual rate challenged, not on the cumulative effects of the general revenue order]. But we know of no Commission order or judicial opinion accepting this theory and it is thus too speculative and too unrealistic to support a denial of jurisdiction." 371 F.Supp. at 1297.

This questionable suggestion is not repeated in appellants' jurisdictional statements. Nor do the Railroads otherwise specify any unexhausted "further remedies" available to EDF, *et al.*, which might justify a postponement of judicial review in this case.

Thus, the Railroads seek, not a postponement of judicial review pending administrative proceedings in which relevant relief can be sought, but rather a total foreclosure of judicial review of the Commission's procedural compliance with NEPA in the course of its general revenue proceedings. This result is totally inconsistent with this Court's holdings on reviewability in cases such as *Overton Park, supra; Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967); *Rusk v. Cort,* 369 U.S. 367, 379-80 (1962); *Brownell v. We Shung,* 352 U.S. 180, 185 (1956); and *Marcello v. Bonds,* 349 U.S. 302, 310 (1955).[10]

Moreover, the effect of such foreclosure as to appellees EDF, *et al.*, would be:

> "significantly [to] dilute the Supreme Court's holding . . . in this case[11] that SCRAP [and EDF, *et al.*, have] full standing, equal to and not derived from the standing of economically interested parties, to seek review of Commission action which allegedly harms their members in their use of the environment,[12]

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[10]Compare *Atchison, T. & S.F.R. Co. v. Wichita Board of Trade,* 412 U.S. 800, 806 (1973), holding that a court has the "duty . . . to determine whether the course followed by the [Interstate Commerce] Commission is consistent with its mandate from Congress" even where, as in *Wichita,* the court may not be permitted to enjoin the collection of increased rates approved by the Commission. In the present case, of course, no issue is presented as to the court's power to grant such injunctive relief. Such relief was denied, 371 F.Supp. at 1307-10, and the denial is not appealed from.

[11]*United States v. SCRAP,* 412 U.S. 669, 683-90 (1973).

[12]371 F.Supp. at 1297. Compare this Court's holding in *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205 (1972) that tenants have standing to attack their landlord's allegedly discriminatory rental policies, and that this standing is equal to and not derived from that of rejected applicants who might bring their own suit – as they in fact did in *Trafficante. (See* Brief of Respondent Parkmerced Corp. on the Merits, No. 71-708, p. 5.)

since it would preclude their obtaining relief for the same asserted "injury in fact" which has been held to give them standing.

2. *That the Interstate Commerce Commission has unreviewable authority to determine the adequacy of its own environmental impact statements.*

This argument takes two forms:

a. The Railroads contend (R.R.J.S., pp. 22-28) that once the Commission has produced a document of a certain length which is labelled an "environmental impact statement," and which "seems to meet the prescriptions of NEPA as to form" in the superficial sense that "it has sections, for instance, on the five considerations which NEPA requires agencies to address in their statements," 371 F.Supp. at 1301, the reviewing court is precluded from further scrutiny of the contents to determine their adequacy.

The reason advanced for this assertion is that any such scrutiny constitutes "judicial review . . . of the substantive merits of the agency's impact statement determinations," R.R.J.S., p. 22, and thus a forbidden substitution of the court's "judgment for that of the expert agency," *id.* at 18; *cf.* Gov.J.S. at 18.

The obvious flaw in this reasoning is that it denies the distinction between two very different kinds of review:

i. Judicial examination of an impact statement to determine its procedural adequacy (*e.g.*, to determine whether it adequately and accurately sets forth such information as the "alternatives to the proposed action,"[13] or the "full range of responsible opinion on

[13]See *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972). Obviously this is not the same question as whether it contains a section which is merely labelled "alternatives."

the environmental effects."[14]); and

ii. Judicial review of the merits of an agency's substantive action—quite apart from the procedural adequacy of its impact statement—to determine whether that action complies with the substantive environmental policies announced in NEPA.

The issues that might be raised by the latter kind of review are simply not presented by this case. Review below was expressly confined to the Commission's "efforts to comply with NEPA's *procedural* commands," which the court found "sorely deficient." 371 F.Supp. at 1299. (Emphasis added.)

The review by the court below of the Commission's impact statement was indistinguishable from the review conducted in numerous other NEPA cases[15] in which courts have recognized and accepted the duty to give a challenged impact statement meaningful examination, rather than terminating that examination on a finding of mere *pro forma* compliance.[16] Appellants have cited no case—and EDF, *et al.*, know of none— in which

[14]*Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783, 787 (D.C.Cir. 1971); *see Silva v. Lynn*, 482 F.2d 1282 (1st Cir. 1973).

[15]See, *e.g.*, *Silva v. Lynn*, note 14, *supra*; *Monroe County Conservation Council v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972); *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972); *Ely v. Velde*, 451 F.2d 1130, 1138-39 (4th Cir. 1971); *Natural Resources Defense Council v. Stamm*, ___ F.Supp. ___, 6 ERC 1525 (E.D. Cal., No. S-2663, April 26, 1974); *I-291 Why? Ass'n v. Burns*, 372 F.Supp. 223, 243-62 (D.Conn. 1974); *Environmental Defense Fund v. Tennessee Valley Auth.*, 339 F.Supp. 806, 809 (E.D.Tenn. 1972).

[16]In determining an impact statement to be inadequate, the courts are not, of course, forbidden, as the Railroads suggest (R.R.J.S. pp. 27-28), to specify the nature of the inadequacy, or of the further information required to cure it. *See* cases cited, note 15, *supra*.

compliance with NEPA as to mere form was held to bar further inquiry into the adequacy of that compliance. Were such a bar to be erected, NEPA would be turned into an empty, unreviewable exercise in red tape. For practical purposes, there would be no judicial oversight of those agencies, which, in the words of Rep. John Dingell, a principal sponsor of NEPA:

> "... are complying poorly. They decide what they are going to do and then write an environmental impact statement to support the decision. That is not what Congress had in mind." *Christian Science Monitor*, Feb. 28, 1973, p. 12.

b. The Government contends (Gov.J.S., pp. 14-15) that the Commission is at liberty to bypass the impact statement procedure specifically mandated by § 102(2)(C) of NEPA if it deems that some other procedure, not sanctioned by the statute, would provide an eventual substitute for purposes of subsequent cases, although not for purposes of the present case.

The court below held that the Commission has a duty to consider the environmental impact of the underlying rate structure in preparing a § 102(2)(C) impact statement on the present across-the-board percentage increase, which necessarily accentuates pre-existing absolute differentials between rates authorized for recyclable materials and those authorized for competing virgin materials. 371 F.Supp. at 1304-05.

The Government's claim, here as below, is that if the Commission has announced that it will ultimately conduct a separate study of the overall rate structure,[17] it need not discuss the environmental impact of this

[17] It appears that the separate study here contemplated will not consider the whole of the underlying rate structure, but only parts thereof. 371 F.Supp. at 1305.

structure in its § 102(2)(C) statements on individual general rate increases, such as the present one, even though omission of such discussion vitiates these statements. 371 F.Supp. at 1305.

This argument ignores the highly specific procedural commands of § 102(2)(C) of NEPA, which require that "every" recommendation or report on a proposal for major federal action significantly affecting the environment include an impact statement; that this impact statement be made on the basis of consultation with other agencies; and that this statement accompany "the proposal" through the agency review processes.[18]

As the Court of Appeals for the District of Columbia Circuit noted in rejecting an identical argument in *Scientists' Institute for Public Information v. Atomic Energy Comm'n*, 481 F.2d 1079, 1091 (D.C.Cir. 1973):

> "to the extent that the Commission's 'environmental survey' [proposed as a substitute for an impact statement] would not be issued in accordance with NEPA's procedures for preparation and distribution, it is not an adequate substitute for a NEPA statement. *These procedural requirements* [in § 102(2)(C) of NEPA] *are not dispensable technicalities, but are crucial* if the statement is to serve its dual functions of informing Congress, the President, other concerned agencies and the public of the environmental factors at all stages of agency decision making." (Emphasis added.)[19]

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[18] *CEQ Guidelines, supra,* §1500.2. As to the rigorous, nondiscretionary nature of these requirements, *see, Calvert Cliffs' Coord. Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. den.* 404 U.S. 942 (1972). *See also Scherr v. Volpe*, 466 F.2d 1027, 1031 (7th Cir. 1972); *Greene County Planning Board v. Federal Power Comm'n*, 455 F.2d 412 (2d Cir. 1972), *cert. den.*, 409 U.S. 849 (1972); *Ely v. Velde*, 451 F.2d 1130, 1138 (4th Cir. 1971); *Natural Resources Defense Council v. Morton*, 337 F.Supp. 170, 172 (D.D.C. 1972).

The case principally relied on by the Government for this claim, *American Lines v. Louisville & N. R. Co.*, 392 U.S. 571 (1968), does not in fact support it. *American Lines* did not authorize a departure from a specific, statutorily mandated procedural scheme. Rather it held that in the absence of such a statutory scheme the "discretion implied in the rate making power" embraced "the method used" as well as the "determination itself." 392 U.S. at 592. Clearly, though, such "implied" discretion cannot take precedence over a specific statutory command.

Acceptance of the Government's invitation to construe the statutory commands of § 102(2)(C) out of existence would negate the most fundamental policy of NEPA, namely that the environmental consequences of proposed federal action be examined *before*, rather than *after*, that action is taken.[20] Such a holding would cast in doubt the binding nature of the § 102 procedural commands not only for the Interstate Commerce Commission,[21] but also for any other agency that might be tempted to invent reasons why these commands should be judicially repealed. This invitation should be rejected.

3. *That although the "existing agency review processes" in this case included a hearing, the impact*

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[20]See *Calvert Cliffs'*, *supra*, 449 F.2d at 1112-15, notes 5-13 and accompanying text.

[21]Whose response to these commands has thus far ranged from "slow" to "combative." *Harlem Valley Transp. Ass'n v. Stafford*, ___ F.2d ___ (2d Cir. No. 73-2496, June 18, 1974) slip op. at 4278; *SCRAP v. United States*, 371 F.Supp. 1291, 1302 (D.D.C. 1974); *SCRAP v. United States*, 346 F.Supp. 189, 195, n. 8 (D.D.C. 1972); *City of New York v. United States*, 337 F.Supp. 150, 158 (E.D.N.Y. 1972).

statement need not "accompany the proposal through [these] processes" as required by §102(2)(C) of NEPA. (Gov.J.S., pp. 18-21; R.R.J.S., pp. 29-32).

Appellants contend that an oral hearing is not statutorily required in a general revenue proceeding, and that the lower court therefore erred in holding that the Commission was required to prepare an environmental impact statement prior to the hearing which the Commission—as it customarily does in general revenue proceedings—did in fact conduct.

But even if it is assumed, as EDF *et al.*, do not concede, that this hearing was not statutorily required, this assumption offers no basis for an attack on the lower court's holding. The lower court held, 371 F.Supp. at 1307, that whether such hearings are required or not, the fact that the Commission "customarily" conducts such hearings makes them a part of the "*existing* agency review processes" (emphasis added) for purposes of § 102(2)(C). (Indeed, the court found that on the facts of this case, the hearing "may well be the most important stage in the decision-making process." *Id.* at 1301.

On this basis, the court correctly held that § 102(2)(C) requires that the impact statement "accompany the proposal" through the hearing,[22] and thus that there is a "strong presumption" that "full consideration of the revised impact statement," once the Commission corrects the defects of its previous version, "must entail oral hearings before the Commission." *Id.* at 1307.

This limited holding is not seriously challenged by appellants, who focus instead on the question—not presented on these facts—of whether a hearing was required in the first place.

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[22]See *CEQ Guidelines, supra,* §1500.7(d).

This Court should not accept appellants' invitation to issue an advisory opinion on this question.

CONCLUSION

These appeals should be summarily dismissed for lack of jurisdiction. In the alternative, the decision and order of the court below should be summarily affirmed.

Respectfully submitted,

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